Before The

FEDERAL COMMUNICATIONS COMMISSION

Washington, D.C.

In The Matter Of:	)	
	)	
Implementation of the Cable Television	)	
Consumer Protection and Competition	)	MM Docket No. 92-265
Act of 1992	)	
	)	
Development of Competition and	)	
Diversity in Video Programming	)	
Distribution and Carriage	)	

COMMENTS OF GROUP W SATELLITE COMMUNICATIONS

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For itself and on behalf of:

Opryland USA Inc,
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Home Team Sports Limited Partnership

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TABLE OF CONTENTS

SUMMARY

The benefits of an integrated multichannel video market to program suppliers and the consuming public have been widely recognized by Congress, the Commission and other authorities. As a result, regulation of integrated companies in this proceeding should be tailored to meet the particular areas of concern evidenced in the 1992 Cable Act, without unnecessarily restricting entities that do not have the capacity or incentive to engage in the behavior congress sought to curb in that legislation.

Congress gave the Commission wide latitude to determine where to draw the regulatory line in the marketplace under Section 628, by directing that the Commission only restrict activities of vendors in which a cable operator has an "attributable interest." In allowing the Commission to define that threshold test, it intended for the Commission to strike an appropriate balance between the concerns Congress had about cable "influence and control" over the distribution of programming and the benefits that stem from the integrated multichannel video market.

In order to completely address the concerns of Congress in Section 628 and avoid unnecessary regulation of programmers that have de minimis relations with cable operators, GWSC suggests that the Commission establish a "regulatory focus" that includes a two-fold analysis of "attributable interest" in the ownership of program services by cable operators.

First, the broadcast attribution rules, complete with their current provisions and understandings, should be used as a threshold for consideration of regulating of integrated relationships. Those rules will eliminate integrated relationships that have been judged to be inconsequential for virtually all other Commission purposes.

Second, for all those entities that are deemed to be integrated under an application of the broadcast attribution rules, in their entirety, a further analysis should be required under Section 628 before finding of an "attributable interest" is made. That analysis should focus, as the Act directs, on the opportunity of the entities involved to engage in the anti-competitive behavior which is at the heart of Section 628. The principal factor in deciding whether or not an integrated relationship has the opportunity to affect such behavior is the subscriber universe served by the subject cable operator. If a program service is judged to be integrated with a cable operator that owns systems that serve less than one percent of the cable marketplace, the concerns of Congress do not apply and regulation should not attach. Congress did not intend to regulate such circumstances, and the Commission should not adopt a regulatory format that sponsors unnecessary marketplace intrusion in those anomalous circumstances.

Where the Commission regulates integrated companies in the video marketplace it should do so sparingly. If the benefits of an integrated market are to be maintained, such regulation should also be limited to areas served by local cable systems owned by integrated cable operators. In addition, the Commission should implement its future rules in this area three years after their effective date in order to give the marketplace the opportunity to eliminate inevitable discrimination between existing and future distribution agreements.

GWSC also suggests that the Commission expressly include in rules formed in this proceeding: protection against unfounded distributor complaints regarding the sale of programming beyond areas of license, acknowledgement that satellite transmissions not meant for public consumption are to be excluded from regulation, and procedures for the automatic and complete protection of the confidentiality of proprietary materials provided to the Commission in any related enforcement proceeding.

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COMMENTS OF GROUP W SATELLITE COMMUNICATIONS

I. Introduction

Group W Satellite Communications ("GWSC") is a venture comprised of direct and indirect subsidiaries of Westinghouse Broadcasting Company, Inc. ("WBC") that are wholly-owed by WBC. Since 1983, GWSC has been principally engaged in the business of distributing cable programming services and providing satellite transmission services.

GWSC currently distributes cable programming services known in the industry as The Nashville Network ("TNN"), Country Music Television ("CMT") and Home Team Sports ("HTS").

The TNN service is wholly-owned by Opryland USA Inc., a subsidiary of Gaylord Entertainment Company ("Gaylord"). The CMT service is wholly-owned by Country Music Television, Inc., a corporation owned indirectly by subsidiaries of Gaylord and WBC. The HTS service is majority-owned by a subsidiary of WBC, with a minority interest held by Affiliated Regional Communications, Ltd.

The satellite transmission business of GWSC is generally comprised of providing signal transmission and other technical services, including master control and traffic functions for a variety of cable and broadcast networks.

GWSC offers its comments in this proceeding from vantage points as a program distributor, with some relation to cable operators, and a supplier of technical services that may be affected by regulations that result from this rule making. As explained more fully below, those comments are delivered in commercial and technical areas in which GWSC finds itself uniquely situated in the marketplace, either directly or in its capacity as an agent for those it is under contract to serve.

II. Attributable Interest of Cable Operators in the Ownership of Program Services

A. Vertical Integration of Cable Program Suppliers Does Not Warrant Arithmetic-Driven Regulation

The fact that investment in program services by cable operators has, in many cases, resulted in significant benefits for all those who subscribe to these services was recognized by Congress in its discussion of Section 628 of the Communications Act.[1] That acknowledgement by Congress succeeds numerous similar conclusions by the Commission and other authorities.

[1]As noted in paragraph 7 of the NPRM, the Senate Report expressly notes that vertical integration in the cable programming marketplace has very real benefits to commercial interests and consumers. (See Senate Report, at pages 26-27.)

In 1990, the Commission recognized that vertical integration within the cable industry produces significant benefits for subscribers.[2] For example, the Commission noted that cable investment in programmers allowed services to remain in operation when they otherwise would have been forced to discontinue programming production, introduction of new services in an increasingly competitive programming market was promoted and incentives to improve programming services were effective in producing new and better programming for consumers.[3] That position was recognized not only by the Commission but by other federal agencies and interests that offered comments for the 1990 Cable Report.[4]

Further, investment by cable operators in program services was not considered by the National Telecommunications and Information Administration to be detrimental to the general welfare of the marketplace in its 1988 study:

> "...common ownership of cable systems and cable programming services does not appear to affect adversely the supply of cable programming or the diversity of viewing choices for cable subscribers." (See House of Representatives Report at page 41.)

Just as investment in programming services by cable operators is not inherently bad, it is also obvious that the lack of such investment does not foretell doom for program suppliers. For example, some of the most popular and widely recognized cable programming is produced and distributed without any cable investment.[5]

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[2]Report in the Matter of Competition, Rate Deregulation and the Commission's Policies Relating to the Provision of Cable Television Service, MM Docket No. 89-900, Released July 31, 1990 ("1990 Cable Report")

[3]1990 Cable Report, paragraphs 82-86.

[4]National Telecommunications and Information Administration, the Department of Justice, the staff of the Bureau of Economics and the San Francisco Regional Office of the Federal Trade Commission. (1990 Cable Report, paragraph 82, footnote 135.)

[5]To the best of its information, GWSC believes that other program services in this category include ESPN, The Disney Channel, USA Network, Arts & Entertainment, The Travel Channel and The Weather Channel.

With clear acknowledgement of the benefits of an integrated marketplace at hand, the Commission should fashion whatever regulations are necessary in this regard to the particular areas of concern of Congress voiced in the 1992 Cable Act rather than instituting regulations for all those who fall on the "wrong side" of an arbitrary percentage ownership threshold. Policies based on the latter will unnecessarily regulate some programmers that Congress did not intend to affect in Section 628. That possibility should be avoided not only because it goes beyond the bounds of the purpose of the Act but also because it risks upsetting the marketplace without a corresponding public interest purpose.

B. Congress Gave the Commission Discretion to Limit Regulation of the Marketplace Through "Behavioral Guidelines"

The Commission correctly points out that Congress gave it wide latitude in the assessment of what is to be considered to be an "attributable interest" of a cable operator in a programming service. It is with that latitude that Congress intended for the Commission to strike an appropriate balance between the concerns it had about "influence and control"[6] over the distribution of programming and the benefits noted above.

As mentioned in the NPRM, the Senate Report on S. 12 refers to the broadcast attribution rules as the intended criteria for use in the context of regulations called for in this area under the original form of the Cable Act. The complete reference of the Senate Committee in that regard also acknowledges that the Commission is free to use any other alternative criteria that it may "deem appropriate".[7]

Left with that expression as the only guidance for definition of "attributable interest", it is of course possible that the Commission could come to the conclusion that it should simply use existing broadcast rules in sorting out which cable operators have a requisite interest in a program service. GWSC does not believe that the Commission must or should come to that conclusion.

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[6]NPRM, paragraph 9.

[7]Senate Report, at page 78.

Reference to the broadcast attribution rules in the Senate Report should be considered to be, at most, a suggestion for threshold involvement of the cable industry and programming services. The Senate Committee quickly added that the Commission should feel free to substitute any other criteria it deems appropriate. With that as a backdrop, the Commission must look to the actual concerns expressed by Congress in the language of the 1992 Cable Act. A review of the relevant statutory passages and the associated legislative history reveals that Congress was not interested in simply regulating integration of ownership beyond an established numerical threshold. Rather, Congress was expressly interested in modifying or prohibiting specified influence and control over program suppliers and vendors in the marketplace.

The Commission is correct in observing that "...Congress's concerns were particularly focused on vertical ownership relationships in the cable industry and the extent to which they may restrict the availability and increase the cost of programming."[8] In that regard, it is clear that Congress was particularly concerned with favored treatment of cable operators over competing distribution technologies by integrated cable programmers.[9] That concern with behavior in the marketplace has no direct relation to any minimal ownership threshold of the cable operator in a given programming service.[10]

The Commission is correct in its observation that something more than an ownership benchmark may well be needed to accomplish the purposes of the 1992 Cable Act.[11] The statute itself gives the Commission full discretion to establish when and where cable ownership and programming services should face regulatory scrutiny. The concerns of Congress as expressed in the Act and its legislative history reveal Congressional direction to the Commission that it consider much more than the suggested broadcast attribution rules. GWSC submits that the

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[8]NPRM, paragraph 7.

[9]Senate Report, at page 26 and the House of Representatives Report, at page 43.

[10]It was acknowledged that one way to deal with vertical integration was to prohibit it all together, but that approach was rejected as being too drastic and unnecessary. Senate Report, at page 27. Regulation of program services solely as a result of any minimum ownership by a cable operator is tantamount to the prohibition of vertical integration to the extent that threshold bears no resemblance to the behavior that is sought to be regulated under Section 628.

[11]NPRM, paragraph 9.

Commission is well within its authority to look beyond minimum ownership thresholds and must pursue the regulation of unfair and harmful behavior under Section 628 through "other criteria" it deems appropriate.

C. Regulation Is Not Justified Where a Vendor Is Partially Owned By a Cable Operator That Serves Less Than One Percent of the Cable Marketplace

In order to completely address the concerns of Congress in Section 628 and avoid unnecessary regulation of programmers that have de minimis relations with cable operators,[12] GWSC suggests that the Commission establish a "regulatory focus" that includes a two-fold analysis of "attributable interest" in the ownership of program services by cable operators.

First, the broadcast attribution rules, complete with their current provisions and understandings, should be used as a threshold for consideration of regulation of integrated relationships.[13] Those rules will eliminate integrated relationships that have been judged to be inconsequential for virtually all other Commission purposes. However, Commission consideration of regulation of vertical integration should not stop there. Under Section 628, the Commission is faced with very different Congressional concerns and statutory purposes related to behavior within and outside vertical relationships unlike the horizontal relationships that are the principal focus of the broadcast rules.

For all those entities that are deemed to be integrated under an application of the broadcast attribution rules, in their entirety, a second analysis should be required under Section 628 before finding of an "attributable interest" is made. That analysis should focus, as the Act directs, on the opportunity of the entities involved to engage in the anti-competitive behavior which is at the heart of Section 628.

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[12]NPRM, paragraph 11.

[13]To the extent those rules are subject to change and further FCC proceedings, those changes should simply be incorporated into whatever rules the Commission adopts here.

As mentioned above, the concerns that Congress had in this area were expressly associated with vertically integrated programming services that are either made unavailable or provided on discriminatory terms to competitors. The principal factor in deciding whether or not an integrated cable operator even has the opportunity to exert such influence and control over the activities of program suppliers is the subscriber universe served by that cable operator. If a program service is judged to be integrated, for threshold purposes, with a cable operator that serves an insignificant number of subscribers, the concerns of Congress do not apply. Those integrated entities have no real power to engage in the behavior discussed in Section 628 and the associated legislative history.

On behalf of any and all entities that are involved in operator/supplier relationships that could be considered to be "integrated" under the broadcast attribution rules and that serve nominal numbers of cable subscribers, GWSC suggests that an "attributable interest" should not be considered to exist when the number of subscribers served by the subject cable operator is less than one percent of all cable television households. It is ludicrous to suggest that connections with cable operations that serve minute numbers of subscribers have either the ability or the incentive to influence the decisions of associated program services. For example, the dominant business of GWSC is the nationwide supply of TNN to over 58 million U.S. television households and CMT to over 17 million U.S. television households. Its meager holdings in cable operations do not even appear as a blip on the policy and planning screen of the company.[14] The total cable subscriber universe of Gaylord, a party with ownership interests in both TNN and CMT, is also dwarfed in comparison to the reach of those services.[15] Neither GWSC nor Gaylord has any incentive whatsoever to affect the distribution policies of the owners of TNN and CMT for the theoretical benefit of minute numbers of cable subscribers in systems in which they have an interest.[16]

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[14]An indirect subsidiary of WBC owns a minority interest in the stock of a single cable system that services approximately 11,000 subscribers under temporary operating authority that is terminable at will.

[15]Gaylord indirectly owns a majority of the stock of a cable operator that serves approximately 170,000 cable subscribers in systems located in only three states.

[16]Even the total of more than 1.3 million U.S. non-cable households that receive TNN, CMT,or both, far outweighs the total of less than 200,000 cable subscribers served by WBC and Gaylord combined.

Congress did not intend to regulate such circumstances, and the Commission should not adopt a regulatory format that sponsors unnecessary marketplace intrusion in those anomalous circumstances.

III. Scope of Regulation of Integrated Relationships

A. Section 628 Only Addresses Harm To Markets Served by Local Cable Systems Owned By Integrated Cable Operators

The unambiguous language of Section 628 (b) that provides the framework for prohibition of various practices limits regulation to "unfair" actions that have the "purpose or effect" of hindering significantly or preventing distributors from providing programming to consumers. No resort to legislative history is necessary to conclude that regulation under this section must be limited to those instances in which harm in the marketplace is experienced. The Commission correctly recognizes that nexus in paragraph 10 of the NPRM.

The Commission also accurately moves from the above analysis to a qualification of the type and level of harm that is necessary to trigger regulation under Section 628 in its Notice in this proceeding. There, GWSC submits that the purpose of Section 628 must again dictate Commission analysis.

As discussed above with respect to the consideration of attributable ownership, Congress clearly focused on integrated programmer incentives to favor its cable operator owners over competing distribution technologies, in Section 628. That concern is rooted in the potential for unfair treatment within cable service areas controlled by cable operators that have influence over various programming services. The market relevant to that concern is the local franchise area served by an integrated cable operator.[17] As a result, the suggestion is well taken by the Commission in paragraph 11 of NPRM that the regulations to be adopted in this proceeding may be appropriately limited to instances in which the subject integrated

[17]"The Committee received much testimony about cable operators exercising their market power derived from their de facto exclusive franchises and lack of local competition." Senate Report, at page 24.

cable operator owns a local cable system. Outside the realm of that potential, the opportunity for "unfair" activities is significantly reduced, if it exists at all.

If the Commission introduces rules that inherently acknowledge degrees of integration in the marketplace by regulating integrated cable operators only in the local cable markets they serve, the results will be logical and more appropriately focused. Cable operators that own large numbers of systems in many regions of the country would then be affected by regulation on a proportionately large scale, as a result. Those integrated cable operators that own relatively few systems serving small numbers of subscribers would conversely, and appropriately, be regulated only to the extent of their limited involvement in the cable marketplace.

B. Regulation of Vertically Integrated Vendors Should Be Installed Three Years After the Effective Date of New Regulations

In paragraph 27 of the Notice in this proceeding, the Commission notes that the 1992 Cable Act is silent concerning enforcement of anti-discrimination rules with respect to existing contracts. The tentative conclusion reached by the Commission that restrictions developed under Section 628 should not be applied retroactively is also well taken. The absence of any conflicting direction by Congress either in the statute or legislative history is telling. The Commission should not retroactively upset agreements in the marketplace without express direction from Congress to do so.

That being said, the Commission also correctly identifies a number of practical issues that are associated with implementation of rules in this area with regard to future agreements and renewals. GWSC suggests that a date three years after the effective date of any new regulations under Section 628 be established for the implementation of those rules. Existing GWSC distribution agreements vary in their term generally from three to five years, all with staggered current expiration dates.[18] A choice of a three year period accommodates that range and coincides with normal business planning for program services and distribution entities.

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[18]To the extent distribution agreements differ in their term between technologies in the normal course, the shortest of those terms should be used as a benchmark for the suggested interim period in

With the establishment of a three year "phase in" period, the chances for discrimination between "new" and "old" contracts, as noted by the Commission, will be reduced significantly. That period allows all parties to adjust to new rules as of the same time, either by renegotiation or by the execution of new agreements or renewals tailored as necessary with that future date in mind.

IV. Other Programming Distribution Issues

A. Geographic Areas

The HTS sports programming service is distributed by GWSC, as noted above, within a very specific and limited geographic area that are the direct result of territorial restrictions imposed by the sports teams and leagues associated with the programming involved. HTS may be distributed only in a region that consists of: all of the District of Columbia, Delaware, Maryland and Virginia and parts of North Carolina, Pennsylvania and West Virginia.

The Commission correctly points out in paragraph 50 of the NPRM that Section 628 contains an acknowledgement that nothing in this section requires distribution of programming beyond any geographic area of license. So that regulations under Section 628 are implemented correctly on this point, GWSC suggests that before any enforcement proceedings can be commenced with respect to a program service that is licensed within a restricted geographic area, the complaining distributor must first request from the program vendor, in writing, distribution rights in specified geographic areas. Thereafter, that complaining distributor must restrict its request for enforcement, under future regulations in this area, to any geographic area that is within the licensed area of a program service. If the complaining distributor either does not first make its desires known with geographic specificity or makes demands for carriage explained to be outside areas of license, the claim should be considered to be "frivolous" without any additional showing.

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order not to disadvantage one technology. In the experience of GWSC, a three year period would accomplish that goal.

B. Internal Network Transmissions

The Operations & Engineering Group of GWSC supplies a significant array of satellite transmission services. Those transmission services include activities related to back hauls and feeds of various cable and broadcast networks that are not meant for public consumption.[19] GWSC agrees with the Commission that those transmissions are excluded from the term "satellite broadcast programming" and any regulations created under Section 628. The transmissions described above are precisely those that Congress had in mind when it drafted the exclusions in Section 628 (c)(3)(B) and should be expressly omitted from regulations under consideration here.

C. Data Collection: Protection of Confidentiality

It is recognized that the Commission will from time to time be required to gather information under Section 628 to consider violations of that section and its related regulations. GWSC believes that some of the information needed may be contained in affiliation agreements between cable programmers and distributors with whom they deal.

To the extent those agreements are subject to review by the Commission, such review should be conducted with procedures that are automatically made applicable to the supply of documentation and that result in the protection of the proprietary information contained in those documents. In addition, a program supplier should be allowed to redact unrelated information from documentation supplied so long as a general description of the redacted material is included with its submission. Each of those steps is deemed necessary by GWSC to protect the proprietary nature of the agreements involved, without affecting review by the Commission, and to comport with standard confidentiality provisions in agreements between the parties.

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[19]GWSC currently serves Arts & Entertainment, The Discovery Channel, Lifetime, CBS and ABC, as well as others, through its Operations & Engineering Group.

Without procedures to implement the suggestions made above, public submission of documentation under Section 628 could instead be a catalyst for anti-competitive behavior within groups of suppliers or distributors.

V. Conclusion

Section 628 of the 1992 Cable Act is restrictive in its purpose and focus. It does not require or intend that the Commission institute regulation of entities that do not have the capability to impact the marketplace "unfairly" or that have not "harmed" the competitive environment.

Regulation of vertically integrated companies under Section 628 should not extend to entities that have only minimal integrated relationships or that have relationships with cable operators that serve an insignificant number of cable subscribers. To the extent regulations are enacted for vertically integrated companies, they should be restricted in their application to harm in markets served by the related cable operator and implemented three years after their effective date.

Respectfully submitted,
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